

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 10

WCC No. 2012-3021

KIM TREVINO

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION

Summary: Petitioner moved for reconsideration of this Court's order which granted summary judgment in favor of Respondent. Petitioner argues that the Court incorrectly concluded as a matter of law that she can perform her time-of-injury job when such a conclusion requires a factual analysis necessitating a trial. Respondent objected to Petitioner's motion, arguing that she is merely re-arguing the same position she set forth in her opposition to Respondent's summary judgment motion.

Held: Petitioner's motion is granted. As the Court noted in its summary judgment order, this Court views summary judgment motions with disfavor and all reasonable inferences must be made in favor of the non-moving party. Petitioner presented evidence which, at a minimum, raised a question of fact as to whether her employer did not return her to her time-of-injury job because she was unable to perform it, whether the FCE evaluator's "reservations" actually constitute restrictions that preclude a return to her time-of-injury job, and whether Trevino's subjective belief as a lay person that she can return to her job must be viewed in the context of her history at this job which has twice resulted in her injury.

Topics:

Summary Judgment: Disputed Facts. The Court granted reconsideration where it found that, although Petitioner had the opportunity to argue her position, the Court did not adequately address her contentions. Specifically, the Court made an unwarranted assumption when it implicitly accepted as credible the deposition testimony of

witnesses. Petitioner presented evidence which, at a minimum, raised a question of fact. Summary judgment was therefore inappropriate.

Summary Judgment: Nonmoving Party. As the non-moving party, Petitioner was entitled to the reasonable inference that one of the possible explanations for her time-of-injury employer's refusal to give Petitioner her time-of-injury job back was because her employer believed she could no longer perform it. This inference raises a question of fact and summary judgment is therefore inappropriate in this case.

¶ 1 Petitioner Kim Trevino moves this Court for reconsideration of its order granting summary judgment in favor of Montana State Fund (State Fund). Trevino contends that the Court erred in concluding that, based on the undisputed facts presented, she could not prove at trial that she was unable to return to her time-of-injury job.¹ State Fund objects to Trevino's motion, arguing that she is not entitled to reconsideration because she is merely re-arguing the same position she argued in response to State Fund's summary judgment motion.²

¶ 2 On January 23, 2013, I granted State Fund's motion for summary judgment regarding Trevino's entitlement to permanent partial disability (PPD) benefits, vocational rehabilitation benefits, and her claim for costs, attorney fees, and penalty. The crux of my ruling was my conclusion that "I do not see any possible way in which Trevino can prove that she is precluded from performing her time-of-injury job."³

¶ 3 Trevino argues that I should not have rendered summary judgment because a legitimate question of fact exists as to whether she can perform her time-of-injury job.⁴ Trevino points out that although she testified that she believes she can perform her time-of-injury job, she was testifying as a lay person who just wanted to go back to work, and that I failed to consider that the job to which she wants to return is the same job that initially injured her and then reinjured her after her first effort to return to work

¹ Motion for Reconsideration and Supporting Brief (Opening Brief), Docket Item No. 16. See *Trevino v. Montana State Fund*, 2013 MTWCC 1. For the sake of clarity, I note that in her brief, Trevino quotes the "Held" as this Court's holding on the summary judgment motion. The "Summary" and "Held" paragraphs which this Court typically inserts above the text of its published decisions are not part of the decision itself, but are provided as a research tool and for ease of reference. In citing to this Court's existing case law, parties should cite to the text of the actual decisions and not to the prefatory summary, held, and topics sections, which the Court considers to be for research purposes only.

² State Fund's Response Brief in Opposition to Petitioner's Motion for Reconsideration (Response Brief), Docket Item No. 17.

³ Order Granting Respondent's Motion for Summary Judgment (Order), 2013 MTWCC 1, ¶¶ 30, 33.

⁴ Opening Brief at 3.

post-surgery. Trevino also argues that although the Functional Capacity Evaluation (FCE) evaluator ultimately opined that she can perform her time-of-injury job, the Court needs to more fully consider the reservations the FCE evaluator expressed and should further consider whether the FCE evaluator's reservations in fact constitute restrictions. Finally, Trevino argues that the record demonstrates that her time-of-injury employer lied on at least one occasion, and therefore this Court should hear testimony and determine the credibility of the employer's statement that it is "hard to say" whether Trevino can perform her time-of-injury job, and whether her employer failed to return her to her time-of-injury job because she could not physically perform it.

¶ 4 In response, State Fund argues that Trevino made these same arguments in response to State Fund's motion for summary judgment, and therefore this matter is not appropriate for reconsideration, but rather Trevino should take the matter up on appeal.⁵

¶ 5 In *Hiett v. Mont. Schools Group Ins. Authority*, this Court held that reconsideration was improper where the claimant "had full opportunity to argue the position before the Court issued its decision and the decision addressed her contentions."⁶ I find the present case to be distinguishable from *Hiett* because, while Trevino had full opportunity to argue her position before I issued the order granting summary judgment, I did not adequately address her contentions. Trevino is correct when she points out that I inadvertently made an assumption regarding the testimony of the witnesses who expressed opinions regarding her ability to return to her time-of-injury position. As it pertains to the testimony of Trevino's employer, I dismissed Trevino's argument that her employer did not rehire her to her time-of-injury job as mere "speculation," stating: "I can think of several possible explanations for National Laundry's failure to give Trevino her job back – some benign, some not."⁷ Trevino presented evidence which, at a minimum, raised a question of fact as to whether her employer did not return her to her time-of-injury job because she was unable to perform it.⁸ As the non-moving party, Trevino was entitled to the reasonable inference that of the "several possible explanations" for National Laundry's failure to give Trevino her job back, one of them was because she could no longer perform it.

¶ 6 For the reasons discussed above, I erred in granting summary judgment in State Fund's favor. A material fact – specifically, Trevino's ability to return to her time-of-

⁵ Response Brief at 2 (citing *Hiett v. Mont. Schools Group Ins. Authority*, 2001 MTWCC 66, ¶ 2).

⁶ *Hiett*, ¶ 2.

⁷ Order, ¶ 29.

⁸ See, Order, ¶¶ 13-15.

injury job – is in dispute and therefore this matter is not appropriate for summary judgment.

ORDER

¶ 7 Petitioner’s motion for reconsideration is **GRANTED**.

DATED in Helena, Montana, this 29th day of March, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Martin
Kevin Braun
Submitted: February 25, 2013